

**BRYCE A. ABBOTT**  
Claimant

**WALLACE, SAUNDERS, AUSTIN,  
BROWN & ENOCHS, CHTD.**  
Respondent

**ITT HARTFORD**  
Insurance Carrier

# KANSAS WORKERS COMPENSATION FUND

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

- (1) What, if any, is the liability of the Kansas Workers Compensation Fund?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered two accidental injuries while employed with respondent. The first in 1988, a slip and fall while in a parking lot, resulted in a low back injury with radiculopathy into claimant's legs. Claimant did not seek medical care but went through a period of self-imposed limitation and restriction which lasted for a substantial period of time. On several occasions claimant discussed his back symptomatology with partners of the respondent law firm, specifically identifying Dana Harris, Mike Oliver and Jerry Bales with whom claimant had conversations.

Claimant suffered back symptomatology off and on through 1990. On January 1, 1991, claimant was made a shareholder in the respondent law firm. On January 7, 1991, claimant suffered another slip and fall, reaggravating his low back with radiculopathy down into his legs. Rather than improving as it had the first time, claimant's back continued to worsen and he sought medical care with Dr. Robert Rawcliffe. He went through conservative treatment, this time under the direction of Dr. Rawcliffe. An MRI done by Dr. William Shapiro at Dr. Rawcliffe's referral indicated a herniated disc in claimant's lumbar spine. Claimant also was diagnosed with degenerative disc disease, which, according to Dr. Rawcliffe, was present prior to the fall in 1988.

Dr. Rawcliffe rated claimant as having a 10 percent permanent impairment to the body as a whole as a result of a herniated disc and degenerative disc disease. He opined that 5 percent of the 10 percent total was attributable to the 1991 injury with the remaining 5 percent being attributable to claimant's condition prior to the 1991 injury. Dr. Rawcliffe, refusing to give a "but for" opinion in this instance, opined claimant's fall would have produced a herniated disc with or without the degenerative disc disease. He was also of the opinion that claimant's preexisting problems made him susceptible to further injury.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 1990 Supp. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

K.S.A. 1990 Supp. 44-567(a) provides:

"(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows: . . . .

"(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely

would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers compensation fund."

"The apportionment of the award between the Fund and the respondent must be based on the actual amount of the disability which is attributable to the second injury as well as the extent that the handicap contributed to the second injury." Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, 698 P.2d 392 (1985); Spencer v. Daniel Constr. Co., 4 Kan. App. 2d 613, 609 P.2d 687, rev. denied 228 Kan. 807 (1980).

The Appeals Board finds in this instance that the employer had knowledge of the claimant's preexisting impairment which constituted a handicap to the claimant's ability to obtain or retain employment. The Appeals Board further finds that while claimant's injury probably or most likely would have been sustained without regard to this preexisting physical impairment, the resulting disability was contributed to by this preexisting impairment.

The Appeals Board further finds that the medical opinion provided by Dr. Rawcliffe showing 5 percent of claimant's functional impairment to be the result of the 1991 injury with the remaining 5 percent stemming from claimant's preexisting condition is competent medical evidence on which to base the apportionment of the award and, as such, the Appeals Board finds the Kansas Workers Compensation Fund shall be responsible for 50 percent of all liability incurred by the respondent in this case.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated September 1, 1994 is affirmed in all respects and the Kansas Workers Compensation Fund shall reimburse respondent for 50 percent of all costs incurred in this matter.

The fees necessary to defray the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund fifty percent each, to be paid as follows:

Deposition Services	
Deposition of Robert A. Rawcliffe, Jr., M.D.	\$155.80
Deposition of Bryce A. Abbott	\$196.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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BOARD MEMBER

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c: Vaughn Burkholder, Wichita, KS  
Michael T. Harris, Wichita, KS  
Shannon S. Krysl, Administrative Law Judge  
Philip S. Harness, Director